

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROBY BENSON,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 261094

Oakland Circuit Court

LC No. 2004-194877-FC

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and third-degree fleeing and eluding a police officer, MCL 750.479a(3), but acquitted of additional charges of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and felonious assault, MCL 750.82. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 12 to 40 years for the robbery conviction and one to five years for the fleeing or eluding conviction. He appeals as of right. We affirm.

Defendant was convicted of robbing a 7-Eleven store in Ferndale. The store clerk testified that she was robbed by a man who was armed with a steak knife. She gave the man between \$190 and \$200 (including a \$50 bill) and a pack of Newport cigarettes before he fled. The clerk immediately called the police and gave a general description of the suspect and the direction he went after leaving the store. The clerk identified defendant as the person who robbed her.

A police vehicle in the vicinity of the store responded immediately and went to a side street that the officers knew had been used in the past as an escape route for robberies in the area. It was approximately 5:30 a.m. and the officers spotted only one car in motion in the area of the store. The officers followed the car and shined a spotlight on it. The car came to a stop, but then drove off as the officers approached. Following a police pursuit, the car crashed into a building and defendant, the driver, fled on foot, but was apprehended a short time later.

Defendant argues that the police did not have grounds to conduct a warrantless stop of his car and that the trial court therefore erred when it denied his motion to suppress evidence. “A trial court’s findings of fact in a suppression hearing are reviewed for clear error; but its ultimate decision on a motion to suppress is reviewed de novo.” *People v Dunbar*, 264 Mich App 240, 243; 690 NW2d 476 (2004).

The trial court concluded that the police were justified in their initial attempt to stop defendant's vehicle under the principles established in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), which allows the police to make warrantless investigative stops:

In order for law enforcement officers to make a constitutionally proper investigative stop, they must satisfy the two-part test set forth in *United States v Cortez*, 449 US 411; 101 S Ct 690; 66 L Ed 2d 621 (1981). The totality of the circumstances as understood and interpreted by law enforcement officers, not legal scholars, must yield a particular suspicion that the individual being investigated has been, is, or is about to be engaged in criminal activity. *Id.* at 418. That suspicion must be reasonable and articulable, *Terry* at 21, and the authority and limitations associated with investigative stops apply to vehicles as well as people. *United States v Sharpe*, 470 US 675, 682; 105 S Ct 1568; 84 L Ed 2d 605 (1985). [*People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993).]

In determining if an officer's suspicion for making a stop was reasonable, articulable, and particular, "[c]ommon sense and everyday life experiences predominate over uncompromising standards." *Id.* at 635-636. Deference should be given to the officer's experience and the patterns of certain types of lawbreakers. *Id.* at 636. "Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause." *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), citing *United States v Sokolow*, 490 US 1; 109 S Ct 1581; 104 L Ed 2d 1 (1989).

Defendant asserts that the police stop was not justified because he did not engage in any evasive action before the police stopped his vehicle. However, evasive activity is only one factor for a court to consider in evaluating whether there was reasonable suspicion to justify an investigative stop. *People v Oliver*, 464 Mich 184, 197-198; 627 NW2d 297 (2001). Whether an investigative stop is justified is determined not from the presence or absence of evasive activity, but from the totality of the circumstances known to the officer at the time of the stop, *Nelson*, *supra* at 635-636.

Here, the trial court appropriately applied *Terry* to find that the totality of the circumstances indicated that the initial stop of defendant's vehicle was supported by a reasonable and articulable suspicion that defendant had been engaged in criminal activity. The officer involved was less than half a mile from the 7-Eleven store when he received a report that the store had just been robbed. The trial court found that at the time of the stop, the officer had determined that (1) the robbery had occurred just minutes before, (2) defendant's vehicle was the only vehicle moving on the street, which the officer knew had been used in the past as an escape route by persons committing crimes in the immediate area, and (3) the officer could see before the stop that defendant was a black male who matched the general description of the suspect. In addition, defendant was driving away from the scene of the crime and was making several turns. These circumstances provided a reasonable, articulable suspicion that defendant may have been involved in the 7-Eleven store robbery to justify an investigative stop pursuant to *Terry*. Contrary to what defendant asserts, there was no evidence that there were "countless other drivers" in the area, or that the police did not know defendant's race or gender before deciding to stop his vehicle.

Next, defendant argues that the victim's in-court identification was tainted by an unduly suggestive identification procedure at the preliminary examination. Because defendant never challenged the victim's identification testimony in an appropriate motion in the trial court, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To show a due process violation, the "defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

A preliminary examination can involve an impermissively suggestive identification procedure. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). But because this issue was never properly raised in the trial court, the record does not provide a basis for concluding that the circumstances of the preliminary examination were unduly suggestive. Furthermore, even if an unduly suggestive identification procedure took place, it is not apparent that the victim lacked an independent basis for her in-court identification. *People v Kachar*, 400 Mich 78, 91-97; 252 NW2d 807 (1977); *People v Thomas Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000). For these reasons, defendant has not shown that the victim's in-court identification testimony constituted plain error.

Furthermore, defendant has not shown that his substantial rights were affected by the victim's identification testimony, that he is actually innocent, or that any error seriously affected the fairness, integrity, or public reputation of this trial. *Carines, supra*. The victim provided the police with a general description of the suspect and defendant was stopped in the vicinity of the crime shortly afterward. The crime occurred at approximately 5:30 a.m., and defendant was the only person observed in the immediate area. In addition, defendant had items connecting him to the robbery in his possession when he was apprehended, namely, a steak knife, approximately \$199 in currency (including a \$50 bill that the victim recalled placing in the cash register just before the robbery), and an unopened box of Newport cigarettes. For these reasons, this unpreserved issue does not warrant appellate relief.

Defendant next argues that his trial attorneys were ineffective for not pursuing the identification issue, and that his appellate attorney was ineffective for not requesting an evidentiary hearing on the question of trial counsel's effectiveness. Our review of this ineffective assistance of counsel issue is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tummolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Although appellate counsel did not request an evidentiary hearing regarding trial counsel's decision not to challenge the victim's identification testimony, defendant filed a motion to remand with this Court, requesting that this Court remand the matter for an evidentiary hearing on this issue. This Court denied the motion. Further, defendant has not demonstrated that a remand is warranted because he does not identify what facts would be established to support a claim for relief.

Furthermore, defendant cannot demonstrate that he was prejudiced by trial counsel's failure to challenge the victim's identification testimony. As previously discussed, even without the victim's identification testimony, other circumstantial evidence connected defendant to the charged robbery, including his possession of a knife that matched the description of the knife used in the crime, and his possession of items taken during the robbery.

For these reasons, defendant cannot demonstrate that he was denied the effective assistance of counsel at trial, or that appellate counsel was ineffective for not requesting an evidentiary hearing.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto